Miscellaneous:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 242

THE GLIDDEN COMPANY, ETC.,

Petitioner,

v.

OLGA ZDANOK, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MARVIN JONES, CHIEF JUDGE OF THE UNITED STATES COURT OF CLAIMS, AND SAMUEL E. WHITAKER, DON N. LARAMORE, JAMES R. DURFEE, BENJAMIN H. LITTLETON AND J. WARREN MADDEN, JUDGES OF THE UNITED STATES COURT OF CLAIMS, AS AMICI CURIAE

The parties have consented in writing to the filing of this brief pursuant to Rule 42.

Interest of Amici Curiae

The question before this Court for review under the limited grant of certiorari is whether the participation by Judge Madden of the Court of Claims in the hearing and decision of the Court of Appeals for the Second Circuit

vitiates the judgment entered by that Court. While the Judges of the Court of Claims have no concern with the outcome of the case as such, the question thus presented raises a number of issues which directly and importantly affect the Court of Claims and its member judges.

Petitioner would have this Court declare unconstitutional the statute, 28 U.S.C. § 293(a), authorizing judges of the Court of Claims "to perform judicial duties in any circuit, either in a court of appeals or district court," pursuant to designation and assignment by the Chief Justice. Any such ruling, while not necessarily controlling, could also cast doubt upon the validity of the statutes, 28 U.S.C. §§291(b), 292(d), authorizing the Chief Justice to assign circuit and district judges for temporary service on the Court of Claims. The system established by the Congress for assigning judges for temporary service on other courts has, we believe, materially improved the machinery for the administration of justice in the federal courts. Certainly, the assigned services of judges of other courts have greatly assisted the Court of Claims from time to time in its operations. Petitioner's constitutional attack on an important aspect of the assignment system consequently is a matter of substantial concern to the Court of Claims.

Petitioner also contends, as a necessary premise to its argument with respect to the assignment statute, that a 1953 statute (67 Stat. 226, 28 U.S.C. §171) in which the Congress declared the Court of Claims to be "a court established under article III of the Constitution of the United States," is unconstitutional, and that the Court of Claims is a "legislative court" established under Article I of the Constitution. The status of the Court of Claims as a constitutional or a legislative court is thus in issue, and the resolution of that issue by this Court in effect will

determine whether the judges of the Court of Claims are protected by Article III with respect to their tenure and compensation.

Some of the issues raised by this case, therefore, are of substantial importance to the status and operation of the Court of Claims and its member judges. For that reason and because of a belief that the views expressed herein may aid this Court in its consideration and decision of those issues, the Judges of the Court of Claims have obtained the consent of the parties to appear as *amici curiae.*

Summary of Argument

The Court of Claims was created in 1855 and was authorized to enter final judgment on certain claims against the United States in 1866. For many years thereafter, the Court was generally considered to be a constitutional court created under Article III of the Constitution. A *dictum* in *Ex Parte Bakelite Corp'n.,* 279 U.S. 438 (1929), however, expressed the view that the Court of Claims was a so-called "legislative court" created pursuant to the Article I power of the Congress to pay the debts of the United States, and *Williams* v. *United States,* 289 U.S. 553 (1933), so held. We believe that *Williams* erred in holding the Court of Claims to be a legislative court and should now be overruled. After thorough consideration, the Congress concluded, in 1953, that the Court of Claims had initially been created as a constitutional court and enacted a statute declaring the Court of Claims "to be a court established under article III of the Constitution of the United States." 67 Stat. 226, 28 U.S.C. § 171. This conclusion by the Congress, we believe, provides justification for reconsideration of *Williams,* and the statutory declaration enacted by the Congress establishes that the Court of Claims has been a constitutional

court since 1953 even if *Williams* is reaffirmed insofar as it held that the Court of Claims was initially created as a legislative court.

I

A. Article III vests the "judicial Power of the United States" in this Supreme Court and in such inferior courts as the Congress may establish pursuant to Article III. Article III also extends this judicial power to specified cases or controversies, and provides that the judges of courts created by or under Article III—so-called "constitutional courts"—shall hold their offices during good behavior and shall receive a compensation which shall not be diminished during their continuance in office. The purpose of these provisions concerning tenure and compensation was to protect the independence of the judiciary from coercive influences of the legislative and executive branches. *O'Donoghue* v. *United States,* 289 U.S. 516, 529-534 (1933). This purpose is particularly applicable to the Court of Claims because of its location at the seat of Government and the nature of its jurisdiction, so that only the most compelling reasons should justify depriving the Court of Claims of the protections of Article III with respect to tenure and compensation.

The language and history of the Constitution, and the separation of powers doctrine fundamental to that document, all indicate that Article III was intended to be the exclusive source of judicial power which power was to be exercised only by Article III courts. *American Insurance Co.* v. *Canter,* I Peters 511 (1828), held, however, that the territorial courts were created and exercise judicial power pursuant to the plenary authority of the Congress under Article I over the territories of the United States. The legislative-court concept thus introduced has become deeply embedded and we do not contend that it should now be rejected entirely. We do contend that it should be limited

in essence to the territorial courts which gave rise to the concept and to which it was confined until the *Bakelite* case was decided in 1929.

B. *Canter* involved the courts of the Territory of Florida, the judges of which had been limited to four-year terms. A holding that Article III applied to such courts would either destroy the judicial system of the Territory or else virtually nullify the tenure provision of Article III, depending upon whether the limited tenure of the Florida judges was upheld. Chief Justice Marshall, in *Canter,* sought to escape this dilemma by the legislative-court concept, explaining that the Florida courts were "incapable of receiving" Article III judicial power because of the limited tenure of the judges and thus must have been created under Article I. This explanation opened the possibility, however, that Article III's requirement of life tenure could be avoided in other situations merely by denying such tenure, and was soon abandoned.

When Florida was admitted to the Union, the status of its courts was again considered, and it was held that the judicial power could only be exercised by courts created pursuant to Article III and staffed by judges possessing the life tenure required by the Article. *Benner* v. *Porter,* 9 How. 235, 243-244 (1850). That case also suggested that *Canter* could be explained on the ground that the Constitution is inapplicable outside the boundaries of the United States proper, and this explanation was adopted in *Downes* v. *Bidwell,* 182 U.S. 244, 263-267 (1901). Other cases sought to explain *Canter* as being due to the temporary nature of territorial courts which were superseded when the particular territory was admitted to the union. *McAllister* v. *United States,* 141 U.S. 174, 187-188 (1891). While these cases adhered to the *Canter* decision and held that the courts of the territories and similar courts, such as the consular

courts, situated outside the boundaries of the United States proper are legislative courts, no case prior to *Bakelite* applied that concept to courts within the United States.

In accordance with this restriction of the legislative-court concept, the Court of Claims was categorized as a constitutional court, *United States* v. *Union Pacific R. Co.*, 98 U.S. 569, 603 (1878), final judgments of the Court of Claims were reviewed by this Court, *United States* v. *Klein*, 13 Wall. 128, 144-145 (1871), and the judges of the Court of Claims were held to be protected against diminution of their compensation, *Miles* v. *Graham*, 268 U.S. 501 (1925). The Tucker Act, in 1877, reenacted the basic jurisdiction of the Court of Claims and conferred concurrent jurisdiction upon the federal district courts during this period when the status of the Court of Claims as a constitutional court seemed to be settled and in apparent acceptance of that status..

The *Bakelite* case, decided in 1929, held the Court of Customs Appeals to be a legislative court in an opinion which endeavored to fashion a general theory of legislative courts encompassing the Court of Customs Appeals, the territorial courts, and a number of other courts, including the Court of Claims and the District of Columbia courts, which were classified in *dicta* as legislative courts. *Bakelite* stated that "the true test lies in the power under which the court was created and in the jurisdiction conferred," and rejected an argument based on the life tenure of the judges of the Court of Customs Appeals as mistakenly assuming "that whether a court is of one class or the other depends on the intention of Congress." 279 U.S., at p. 459. This "true test" is largely circular, however, in that the basic issue is the power (Article I or Article III) under which the particular court was created, and does not really explain the territorial-court cases as such courts, including the Florida courts involved in *Canter*, generally were conferred federal-question jurisdiction virtually in the language of

Article III. Furthermore, this sudden expansion of the legislative-court concept seriously undermined the purpose of Article III to protect the independence of the federal judiciary.

O'Donoghue v. *United States,* 289 U.S. 516 (1933), held the District of Columbia courts to be constitutional courts, rejecting the contrary *dictum* in *Bakelite.* The purpose of Article III to protect the independence of the judiciary was stressed and the territorial-court cases once again were placed in a special category for which the temporary nature of territorial governments provided some justification. Otherwise, the determination of whether a court was created under Article III depends upon whether "the judicial power conferred extend[s] to the cases enumerated in that article." *Id.,* at p. 546. The fact that the Congress may have conferred non-Article III jurisdiction on a court does not affect its status as a constitutional court. Thus, the District of Columbia courts were found to be constitutional courts because they exercised jurisdiction over cases and controversies coming with the scope of Article III and despite the fact that they also had certain administrative and quasi-judicial advisory functions. Futhermore, the life tenure of the judges of the District of Columbia courts and other indications that the Congress intended to create such courts under Article III were considered to be significant factors.

The *Williams* case was decided on the same day as *O'Donoghue* and the opinions in both cases were written by Mr. Justice Sutherland. In holding the Court of Claims to be a legislative court, *Williams* relied heavily upon the *dictum* to that effect in *Bakelite,* but also held that the Court of Claims does not exercise jurisdiction over cases or controversies coming within the categories enumated in Article III. *Bakelite* was quoted for the proposition that the advisory jurisdiction exercised by the Court of Claims in some instances demonstrated that it had been treated by

the Congress as a legislative court. These conclusions, necessary to harmonize the *Williams* decision with the criteria expressed in the *O'Donoghue* opinion rendered the same day, were, we believe, erroneous.

In *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582 (1949), four opinions were written, none of which gained the adherence of a majority of the Court. Some aspects of the legislative court-constitutional court controversy were discussed in all four opinions, and three of the opinions representing six members of this Court indicated disagreement with the holding in *Williams* that the Court of Claims does not exercise Article III jurisdiction.

C. Accepting the fact that the legislative-court doctrine is too firmly entrenched to be uprooted altogether, we believe that the *O'Donoghue* approach provides an appropriate accommodation with the purpose of Article III to protect the independence of the judiciary. With the exception of the territorial and similar courts situated outside the boundaries of the United States proper which may be said to be "incapable of receiving" Article III judicial power because of their presumably temporary nature, any federal court granted jurisdiction over cases or controversies of a kind enumerated in Article III is an Article III court and its members are judges entitled to the protections provided in Article III with respect to tenure and compensation. This protection is not lost merely because the Congress may also have conferred non-judicial functions on the court under Article I, and the intention of the Congress may be persuasive if there is any doubt as to the Article III jurisdiction and nature of a particular court. While *Williams* appears to have accepted the approach enunciated in *O'Donoghue,* it erred in concluding that the Court of Claims does not exercise any Article III jurisdiction and has been treated by the Congress as a legislative court.

D. Article III extends the judicial power of the United States to, among other things, "Controversies to which the United States shall be a Party." Although the United States is a party to all litigation in the Court of Claims, *Williams* held that such litigation does not come within Article III because the above-quoted provision is to be construed as applying only to cases in which the United States in a party *plaintiff*. This construction is contrary to the plain meaning of the term "party," and no support was cited or has been found in the debates at the Constitutional Convention. *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), which was participated in by several members of the Constitutional Convention, held that "party" as used in the provision of Article III giving this Court original jurisdiction over cases "in which a State shall be a Party" included cases in which a state is a defendant as well as those in which it is a plaintiff. This Court has continued to hold that it has original jurisdiction over actions brought against a state as a defendant with respect to those cases and controversies over which the judicial power extends. *United States* v. *Texas,* 143 U.S. 621, 643-644 (1892).

Minnesota v. *Hitchcock,* 185 U.S. 373, 383 (1902), held that Article III judicial power over controversies to which the United States is a party included cases to which the United States is a defendant when it consents to be sued, as in the Court of Claims. In overruling this decision and rewriting the plain language of Article III, *Williams* asserted that the framers of the Constitution did not contemplate the possibility that the United States might be a party defendant because of its sovereign immunity from suit. *Hans* v. *Louisiana,* 134 U.S. 1 (1890), which expressed approval of the dissenting opinion of Mr. Justice Iredell in *Chisholm* v. *Georgia,* was relied upon to support this proposition. Both the *Hans* opinion and the Iredell dissent,

however, recognized that sovereign immunity could be waived and that a sovereign could be sued in the federal courts with its consent. Moreover, the concept of waiver of sovereign immunity was well known when the Constitution was adopted. See *Monaco* v. *Mississippi*, 292 U.S. 313, 323-324 (1934).

In any event, *Williams* failed to consider the possibility that the Court of Claims exercises Article III judicial power under the provision extending that power to cases arising under the Constitution and laws of the United States. Under the Tucker Act, the Court of Claims and the federal district courts exercise concurrent jurisdiction over claims founded upon the Constitution, Acts of Congress, federal regulations or contracts authorized by statute. All of this jurisdiction would appear to be Article III federal-question jurisdiction, and six Justices of this Court so indicated in the *Tidewater* case. Also, since a statutory waiver of sovereign immunity is essential to a suit against the United States, claims brought in the Court of Claims necessarily must involve a question arising under the laws of the United States. We believe, therefore, that *Williams* erred in holding that the Court of Claims does not exercise Article III judicial power.

E. The Court of Claims was constituted in substantially its present form during the eleven-year period between 1855 and 1866. The judges of the Court of Claims were given life tenure during good behavior, and the legislative history of the pertinent statutes demonstrates beyond reasonable doubt that the Congress intended to create the Court of Claims under Article III as an inferior court for the exercise of Article III judicial power. This legislative history, which was not referred to in the *Williams* opinion, shows that *Williams* also erred in concluding that

the Congress has treated the Court of Claims as a legislative court.

II

The 1953 statute, which declares the Court of Claims "to be a court established under article III of the Constitution of the United States," validly establishes the present status of the Court of Claims as a constitutional court even if *Williams* is reaffirmed in holding that the Court of Claims initially was created as a legislative court. *Williams* conceded that this holding could be reconciled with the concurrent Tucker Act jurisdiction of the federal district courts and with the review by this Court of judgments of the Court of Claims, only by the concept adopted in *Williams* that the Court of Claims exercises "judicial power" which can be conferred upon Article III courts as well as upon Article I courts even though such "judicial power" is conferred under Article I. While this concept of "judicial power" apart from that provided in Article III seems to us to be inconsistent with the language of the Constitution and the purpose of Article III to assure an independent judiciary, the concept was vital to the *Williams* decision and, we believe, must be accepted if that decision is reaffirmed. Assuming, therefore, that the Congress under Article I can confer judicial power over claims against the United States upon either Article I courts or Article III courts, we see no reason why the Congress should not be free to declare that the Court of Claims henceforth shall exercise such judicial power as an Article III court.

While the Congress in the 1953 Act was expressing its view that the Court of Claims has always been a constitutional court, this was done in the form of a declaration entitled to future effect even if the Congress was mistaken about the past status of the Court of Claims. *Postmaster-*

General v. *Early*, 12 Wheat. 136, 148-149 (1827). Such a change in the status of the Court does not, we believe, necessitate reappointment of its judges. Cf., *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893). They already had life tenure, and they were appointed by the President and confirmed by the Senate as required by the Constitution. The surrender of any right that the Congress may have had to reduce their compensation hardly suffices in itself to require reappointment. Moreover, the status of the Court of Claims poses no serious threat, in our opinion, to its limited advisory functions in congressional reference cases, in view of the holding in *O'Donoghue* that the District of Columbia courts may exercise jurisdiction of a similar nature. In any event, it would seem that such functions could be performed voluntarily, even if they could not be required, and the Congress enacted the 1953 Act even though advised that the congressional reference jurisdiction of the Court of Claims might be affected by the Act.

Argument

The status of the Court of Claims as a constitutional court established under Article III of the Constitution seemed to be settled until *Ex Parte Bakelite Corp'n.*, 279 U.S. 438, 452-455 (1929), expressed the view that the Court of Claims was a legislative court while holding that the Court of Customs Appeals (now the Court of Customs and Patent Appeals) was a legislative court. This *dictum* in *Bakelite* with respect to the status of the Court of Claims was converted into a holding by *Williams* v. *United States*, 289 U.S. 553 (1933). *Bakelite* and *Williams* provide the basis for petitioner's contention that Judge Madden's participation in the hearing and decision below was unconstitutional, even though his assignment by the Chief Justice

to serve temporarily on the Court of Appeals for the Second Circuit was authorized by statute.

With all deference, but with the frankness which the subject demands, we suggest that the *dictum* of this Court in *Bakelite* and its holding in *Williams* were seriously in error and should be reexamined. We are encouraged in this suggestion by the fact that the status of the Court of Customs and Patent Appeals—the subject of the holding in *Bakelite*—is also before this Court at the present time in *Lurk* v. *United States,* No. 481, cert. granted, 368 U.S. 815 (1961). We are further encouraged in this suggestion by the fact that the Congress, after thorough consideration, has concluded that *Bakelite* and *Williams* were wrongly decided, and has expressed that conclusion in legislation.

In 1953, the Congress enacted a statute (67 Stat. 226, 28 U.S.C. § 171) in which the Court of Claims was "declared to be a court established under article III of the Constitution of the United States." A similar statute (72 Stat. 848, 28 U.S.C. § 211) was enacted in 1958 with respect to the Court of Customs and Patent Appeals.[1] The language of these acts indicates a congressional belief that the existing status of the courts in question was being declared, rather than a changed status, and this is confirmed by the legislative history of the 1953 Act. H. Rept. No. 695, 83d Cong., 1st Sess., states, at p. 2, that:

> "The principal purpose of this bill is to declare the United States Court of Claims to be a court established under article III of the Constitution. Subsequent to a long line of decisions which recognized the Court of Claims as such a constitutional court,

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[1] A similar statute (70 Stat. 532, 28 U.S.C. § 251) was also enacted, in 1956, with respect to the Customs Court, which another *dictum* in *Bakelite* (279 U.S., at pp. 457-458) had characterized as a legislative court.

> the United States Supreme Court held in 1933 that the Court of Claims was not organized under the provisions of article III, but rather was created by Congress as a so-called legislative court in the exercise of its constitutional power under article I to pay the debts of the United States. By Congress declaring unequivocally—as this bill proposes—that the Court of Claims was in fact established as, and continues to be, a constitutional court, this measure not only will protect the independence of the bench of the Court of Claims, but also will remove any doubt as to the power of Congress to authorize the Chief Justice of the United States to assign district and circuit judges to assist the judges of the Court of Claims whenever such action is considered necessary or expedient. . . ."

See, also, S. Rept. No. 275, *83d Cong., 1st Sess., p. 2.*[2]

The House Report, at pp. 3-5, contains a detailed discussion of many of the pertinent decisions, including *Bakelite* and *Williams,* and refers to the legislative history of the statute initially creating the Court of Claims as "indicating that Congress intended to create a court under the power granted to it by article III to create inferior courts."

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[2] S. Rept. No. 275 was a "corrected report" substituted (99 Cong. Rec. 5020) for S. Rept. No. 261, 83d Cong., 1st Sess., which originally accompanied the bill reported to the Senate. Language in the earlier report (at p. 2) stating that the Committee was of the opinion that the Court of Claims "more properly should have been so created" under Article III, was replaced in the corrected report by a statement that the Committee was of the opinion "that Congress intended it to have been so created" under Article III. When the Senate bill came up for debate on the floor of the Senate, the House bill was substituted for it at the request of Senator Gore, who explained that the House bill made entirely clear that the Congress did "not intend to create a new court" by "simply declaring that the existing Court of Claims should be a court established under article III of the Constitution. . . ." 99 Cong. Rec. 8943.

We demonstrate, in Part II of this Argument, that the declaration by the Congress in the 1953 Act is determinative of the present status of the Court of Claims, even if this Court should reaffirm *Williams* and hold that prior to that Act the Court of Claims was a legislative court. But we also believe that the 1953 Act, and the considered judgment of the Congress expressed therein that the Court of Claims has always been a constitutional court, justifies a reconsideration by this Court of its holding in *Williams*. Cf., *United States* v. *Hutcheson*, 312 U.S. 219, 235-237 (1941).[3] In Part I of this Argument, we show that such a reconsideration should lead this Court to overrule *Williams* and confine the legislative-court doctrine to its proper sphere.

I

The Williams Decision Erred in Holding that the Court of Claims Was Created as A Legislative Court

The *Bakelite* and *Williams* decisions are not an integral part of a settled doctrine of constitutional law the overruling of which might have far reaching effects. Rather, those decisions suddenly expanded a narrow, judicially-created exception to Article III of the Constitution—an exception for many years limited to territorial courts and which even as so limited rested on reasoning that is dubious at best. The "contradictions, complexities and subtleties" found by Mr. Justice Rutledge "in the maze woven by

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[3] While an expression by a later Congress of its views is "not conclusive" insofar as the intent of an earlier Congress in enacting a statute is concerned, such an expression is "entitled to great respect" from the courts in determining that intent. *United States* v. *Clafin*, 97 U.S. 546, 548 (1878); see, *e.g.*, *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 310-313 (1954); *N.Y. & Norfolk R.R.* v. *Peninsula Exchange*, 240 U.S. 34, 39 (1916).

the 'legislative court—constitutional court' controversy"[4] were largely engendered by *Bakelite* and subsequent decisions, including *Williams,* which sought to deal with the extensive *dicta* in the *Bakelite* opinion. In all of this controversy, the important purposes intended to be served by Article III, and particularly the safeguarding of the independence of the federal judiciary, seem to us to have been needlessly slighted. *Williams* ignored the plainly expressed intent of the Congress to create the Court of Claims as a constitutional court under Article III—an intent which would seem to be decisive if the Congress had an option between a legislative and a constitutional court. Thus, we show below that, for these and other reasons, *Williams* is unsound and should be overruled.

A. *The Provisions and Purposes of Article III.* In accordance with the separation of powers doctrine basic to our Constitution, that document separately provides for the "legislative Powers" (Article I), for the "executive Power" (Article II), and for the "judicial Power" (Article III) of the United States. Section 1 of Article III provides that:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

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[4] *Nat. Ins. Co.* v. *Tidewater Co.,* 337 U.S. 582, 604-605 (1949) (concurring opinion).

Section 2 of Article III provides that the "judicial Power" shall extend to specified cases and controversies, including cases arising under the Constitution and laws of the United States and controversies to which the United States shall be a party. Section 2 also provides for limited original jurisdiction in this Supreme Court and that in "all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Article III in addition contains provisions respecting the right to jury trials and defining the crime of treason against the United States.

The purpose of conferring life tenure upon federal judges during good behavior and of prohibiting any diminution of their compensation, undoubtedly was to safeguard the independence of the judiciary—to assure that federal judges shall be "independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments." *O'Donoghue* v. *United States,* 289 U.S. 516, 530 (1933), and see, generally, pp. 529-534; *Evans* v. *Gore,* 253 U.S. 245, 248-254 (1920). The importance attributed to this purpose is indicated by "the following strong and frequently quoted language" of Chief Justice Marshall, in the course of the debates of the Virginia State Convention of 1829-1830, as quoted in *O'Donoghue* v. *United States, supra* at p. 532:

> "The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he [the judge] should be rendered per-

> fectly and completely independent, with nothing to influence or control him but God and his conscience! . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary."

O'Donoghue pointed out that the reasons which impelled the adoption of the limitations in Article III concerning the tenure and compensation of federal judges "apply with even greater force to the courts of the District [of Columbia] than to the inferior courts of the United States located elsewhere, because the judges of the former courts are in closer contact with, and more immediately open to the influences of, the legislative department, and exercise a more extensive jurisdiction in cases affecting operations of the general government and its various departments." *Id.*, at p. 535. The Court of Claims, of course, is also located in the District of Columbia, and is exclusively concerned with claims to which the United States is a party and arising out of the "operations of the general government and its various departments." Since the Court of Claims comes so clearly within the intent and purposes of Article III, seemingly only the most persuasive reasons would be sufficient to justify a finding that Article III is inapplicable to that Court and to the judges thereof.

Indeed, *Williams* recognized that the Court of Claims closely resembles the District of Columbia courts in this respect. "It is a court of great importance, dealing with claims against the United States, which, in the aggregate, amount to a vast sum each year. The questions which it considers call for the exercise of a high order of intelligence, learning and ability. The preservation of its independence is a matter of public concern. The sole function

of the court being to decide between the government and private suitors, a condition, on the part of the judges, of entire dependence upon the legislative pleasure for the tenure of their offices and for a continuance of adequate compensation during their service in office, to say the least, is not desirable." 289 U.S., at pp. 561-562. Where *Williams* erred, as we attempt to show later in this brief, was not in recognizing the desirability of affording the protections of Article III to the Court of Claims and its judges, but in the reasons given for withholding that protection.

There is nothing in the language of Article III, or elsewhere in the Constitution, to indicate that the Congress was intended to have the power to establish so-called legislative courts for the exercise of judicial power unrestricted by the limitations of Article III. The more natural implication, we believe, is that the framers of the Constitution intended Article III to be the exclusive source of judicial power, with the judicial system being limited to courts established under and exercising jurisdiction within the limits prescribed by that Article. This implication is reinforced by the fact that Article III represented a careful compromise of conflicting views, after considerable debate over the desirability of creating a federal judicial system and over the scope of the judicial power to be entrusted to the federal courts.[5] It is difficult to believe that the framers contemplated or intended to permit a facile avoidance of the limitations of Article III through the device of legislative courts created under Article I. Insofar as we have been able to discover, the possibility of such legislative courts was never suggested during the debates in

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[5] See the concurring opinion of Mr. Justice Rutledge and the dissenting opinions of Chief Justice Vinson and Mr. Justice Frankfurter in *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582, 615-617, 627-634, 647-654 (1949).

the Constitutional Convention or over ratification of the Constitution by the States.

The legislative-court concept was early enunciated, nevertheless, in an opinion by Chief Justice Marshall for an unanimous Court in *American Insurance Co.* v. *Canter,* 1 Peters 511 (1828), and we do not contend that the concept should be or need be entirely eradicated at this late date. But *cf., Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). We do contend that the legislative-court exception to Article III should be confined to the territorial and other courts without the boundaries of the United States proper, such as were involved in *Canter* and in all applications of the legislative-court doctrine prior to *Bakelite.*

B. *Development of the Concept of Legislative Courts.* In *American Insurance Co.* v. *Canter, supra,* the Insurance Company had brought an action against Canter to recover 356 bales of cotton purchased by Canter at a salvage sale pursuant to a decree of a court of the then Territory of Florida. The Insurance Company contended, among other things, that the Congress could not vest admiralty jurisdiction in courts created by the Florida territorial legislature because Article III vested the whole of the judicial power, including cases of admiralty and maritime jurisdiction, "in one supreme court, and in such inferior courts as congress shall from time to time ordain and establish." 1 Peters, at p. 546. Replying to this argument, Chief Justice Marshall stated (*ibid.*) that:

> "We have only to pursue this subject one step further, to perceive that this provision of the constitution does not apply to it. The next sentence [of Article III] declares, that 'the judges of both of the supreme and inferior court [*sic*], shall hold their office during good

behavior.' The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states, in those courts only which are established in pursuance of the third article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government."

Chief Justice Marshall's reasons, as stated in *Canter*, for holding the Florida territorial courts to be legislative courts are plainly inapplicable to the Court of Claims. The Florida courts were said to be "incapable of receiving" Article III judicial power because the judges of those courts were appointed for a limited term, while the judges of the Court of Claims "hold office during good behavior." 28 U.S.C. § 173. And the determination and payment of claims against the United States involves an exercise of the powers of the general federal government as such

rather than "the combined powers of the general, and of a state government." Moreover, there were practical reasons for the *Canter* decision which are inapplicable here. Professor Moore has pointed out that this Court was faced in *Canter* with the problem of avoiding destruction of the judicial system in the Territory of Florida despite the limited tenure of the judges of the Florida courts, and at the same time avoiding impairment of Article III's guarantee of life tenure during good behavior, insofar as that could be done. 1 Moore, Federal Practice, pp. 57-58 (2d ed.). In addition, as Webster argued to this Court in *Canter*, it would "be a hard case against the claimant of the property [Canter], should he lose it, having purchased it in good faith under the decree of a court exercising jurisdiction over the matter, and to which jurisdiction, no objection was made by the parties to the proceeding." 1 Peters, at p. 537.

Whether or not *Canter* was a hard case which made bad law, that decision posed a threat to the continued vitality of Article III, insofar as it was grounded upon the view that the Florida courts were "incapable of receiving" Article III judicial power because of the limited tenure of the judges of those courts and, therefore, must have been created pursuant to some other power of the Congress. If non-compliance with Article III, at least insofar as tenure was concerned, served to establish the inapplicability of Article III, the safeguards in that Article of an independent judiciary could easily be avoided if the Congress was so minded.

The unsatisfactory nature of this rationale for the legislative-court doctrine was soon recognized, and efforts were made to limit the scope of the doctrine and to suggest other explanations for it. Thus, in *Benner* v. *Porter*, 9

How. 235, 243-244 (1850), where an issue arose concerning the status of the Florida courts after admission of that State to the Union, this Court stated that:

> "The admission of the State into the Union brought the Territory under the full and complete operation of the Federal Constitution, and the judicial power of the Union could be exercised only in conformity to the provisions of that instrument. By art. 3, § 1, 'The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour.'
>
> "Congress must not only ordain and establish inferior courts within a State, and prescribe their jurisdiction, but the judges appointed to administer them must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution. The Territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Federal government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. (1 Pet., 546.) Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body was incapable of conferring upon the courts within the limits of a State."

Benner v. *Porter*, therefore, suggested that the territorial courts were not subject to the Constitution at all, while firmly disclaiming the possibility that the legislative-court doctrine might be extended to courts created by the Con-

gress within a State of the Union. This suggestion was elaborated in *Downes* v. *Bidwell,* 182 U.S. 244, 263-267 (1901), where the majority stressed that the territories were not considered to be part of the United States and for that reason were beyond the reach of the Constitution and Article III thereof.[6] In so doing, they pointed to the difficulties which would arise if *Canter* were placed on any other basis, as follows (*id.,* at p. 267):

> "But if they be a part of the United States, it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution. The power to make needful rules and regulations would certainly not authorize anything inconsistent with the Constitution if it applied to the territories. Certainly no such court could be created within a State, except under the restrictions of the judicial clause. It is sufficient to say that this case [*Canter*] has ever since been accepted as authority for the proposition that the judicial clause of the Constitution has no application to courts created in the territories, and that with respect to them Congress has a power wholly unrestricted by it."

The view that the Constitution is inapplicable outside the territorial limits of the United States proper was also advanced to uphold the validity of consular courts which failed to comply with various constitutional guarantees. *In re Ross,* 140 U.S. 453 (1891).

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[6] "As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution, and upon territory which is not part of the United States within the meaning of the Constitution." 182 U.S., at p. 266.

A concurring opinion in *Downes* v. *Bidwell, supra,* at p. 293, expressed the view that *Canter* and similar decisions with respect to the legislative nature of territorial courts grew out of "the presumably ephemeral nature of a territorial government. . . ." This view had earlier been advanced in *McAllister* v. *United States,* 141 U.S. 174, 187-188 (1891), where this Court held that judges of territorial courts were not entitled by Article III to life tenure and stated that the "absence from the Constitution of such guarantees for territorial judges was no doubt due to the fact that the organization of governments for the Territories was but temporary, and would be superseded when the Territories became States of the Union."

Thus, while this Court adhered to the holding in *Canter* that the territorial courts are legislative courts rather than constitutional courts created under Article III, the rationale for that holding was shifted and the holding in effect was limited to the territorial courts and similar courts (such as the consular courts) situated without the geographic boundaries of the United States proper. Prior to *Bakelite,* decided in 1929, no case had held that a federal court situated within the United States proper was a legislative court not subject to the requirements of Article III.[7]

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[7] The courts in Indian Territory were held to be legislative courts, *Stephens* v. *Cherokee Nation,* 174 U.S. 445, 478 (1899); *Wallace* v. *Adams,* 204 U.S. 415, 422 (1907). While the basis for that holding was not explained, Indian Territory would not seem to differ in this regard from other territories of the United States. The United States Court for China, classified by *dicta* in *Bakelite* (279 U.S., at p. 451) as a legislative court, was similar to the consular courts in being located without the territorial limits of the United States. *Bakelite* (279 U.S., at p. 456) cited *Coe* v. *United States,* 155 U.S. 76 (1894), as holding the Court of Private Land Claims to be a legislative court. But the holding in *Coe* was expressly limited to the jurisdiction of that Court over claims to land situated in the territories, and *Coe* refused to determine "whether it was within the power of Congress to create a judicial tribunal of this character for the

Consistent with the limited scope of the legislative-court doctrine prior to *Bakelite*, this Court repeatedly classified the Court of Claims as a constitutional court created by the Congress as an inferior court under Article III.[8] The Court of Claims was created in 1855 (10 Stat. 612), but initially had authority only to investigate claims, report upon them to the Congress and recommend bills for enactment by the Congress. In 1863, a broad revision of the law governing the operation of the Court of Claims (12 Stat. 765) purportedly made its judgments final subject to appeal to this Court, but included a provision that no money should be paid out of the Treasury on any adjudicated claim until an appropriation therefor had been estimated by the Secretary of the Treasury. Because of this administrative review to which judgments of the Court of Claims apparently were subjected, *Gordon* v. *United States*, 2 Wall. 561 (1864), dismissed for want of jurisdiction an attempted appeal from a judgment of the Court. An elaborate opinion prepared for that case by Chief Justice Taney, who died before announcement of the decision in the case, was later published in 117 U.S. 697.

We discuss in a subsequent part of this brief, pp. 53-59, *infra*, the legislative history of these early statutes which, we believe, demonstrates conclusively that the Congress intended at all times to establish the Court of Claims as an inferior tribunal under Article III, even though initially mistaken as to the finality of judgment requisite to such

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determination of title to property situated in the States." 155 U.S., at pp. 85-86. This Court never had occasion to resolve the issue thus left open in *Coe*. See Katz, *Federal Legislative Courts*, 43 H.L.R. 894, 908 (1930). *O'Donoghue* v. *United States, supra* at pp. 550-551, pointed out that no case prior to *Bakelite* could properly be understood as holding the District of Columbia courts to be legislative courts.

[8] Legal writers generally agreed with this classification. See Katz, *Federal Legislative Courts*, 43 H.L.R. 894, 906 (1930), and authorities there cited.

a tribunal. It was this lack of finality, so Chief Justice Taney explained, which prevented the Court of Claims, as initially established, from being an "inferior court," and "this Court . . . cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States." 117 U.S., at pp. 702, 704.

Shortly after the *Gordon* decision, in 1866, the Congress repealed the objectionable provision for administrative review of judgments of the Court of Claims (14 Stat. 9), and this Court thereupon amended its rules to provide for appeals from judgments of that Court (3 Wall. vii-viii). Following these amendments to the statute and to the rules, this Court accepted jurisdiction of the first appeal from a judgment of the Court of Claims, *De Groot* v. *United States,* 5 Wall. 419 (1866), and, of course, has since taken jurisdiction of countless appeals from such judgments. Viewed in the light of the explanation given by Chief Justice Taney in *Gordon* for the initial rejection of such an appeal, this Court must have considered the Court of Claims to be an inferior tribunal established under Article III once finality of judgment was provided. And, this Court soon so stated, in *United States* v. *Klein,* 13 Wall. 128, 144-145 (1871), as follows:

> "Originally, [the Court of Claims] was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.
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> "In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay

each claimant. This court being of opinion that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision. Since then the Court of Claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal.

"The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal lies regularly to this Court."

On numerous subsequent occasions, this Court reiterated the view that the Court of Claims existed under Article III as a constitutional court. In *United States* v. *Union Pacific R. Co.*, 98 U.S. 569, 603 (1878), for example, this Court stated:

"Congress has, under this authority [Article III], created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution. It has also regulated the appellate jurisdiction of the Supreme Court."

In *United States* v. *Louisiana*, 123 U.S. 32 (1887), an objection was raised to the jurisdiction of the Court of Claims over a suit brought by a state against the United States Refuting that objection, this Court first quoted the pertinent language of Article III and then held (*id.*, at p. 35) that:

"The action before us, being one in which the United States have consented to be sued, falls within those designated, to which the judicial power extends; for, as already stated, both of the demands in controversy arise under laws of the United States. Congress has

> brought it within the jurisdiction of the Court of Claims by the express terms of the statute defining the powers of that tribunal, unless the fact that a State is the petitioner draws it within the original jurisdiction of the Supreme Court."

See also, *Minnesota* v. *Hitchcock,* 185 U.S. 373, 386 (1902); *Kansas* v. *United States,* 204 U.S. 331, 342 (1907). In *Miles* v. *Graham,* 268 U.S. 501, 509 (1925), this Court held that imposition of an income tax upon the salary of a judge of the Court of Claims was "forbidden by the Constitution." The reference to the Constitution must have been to that provision in Article III that the compensation of judges of courts established pursuant to that Article "shall not be diminished during their Continuance in Office."

Throughout this period of some 60 years during which the status of the Court of Claims as a constitutional court seemed to be settled, the Congress never took any action to change its status to that of a legislative court. Rather, the Congress in 1877 reenacted the basic jurisdiction of the Court of Claims as a part of the Tucker Act, 24 Stat. 505, and at the same time extended concurrent jurisdiction over the same claims (up to $10,000) to the federal district courts, which have always been considered to be constitutional courts. See *Mookini* v. *United States,* 303 U.S. 201, 205 (1938). The Tucker Act was adopted only eight years after this Court, in *United States* v. *Union Pacific R. Co., supra,* had expressly referred to the Court of Claims as having been created under Article III. The House Report on the bill enacted as the Tucker Act pointed out the advantages of having a court of justice ascertain rights as between litigants, and stated that it was proposed to extend the jurisdiction of the Court of Claims to include

certain claims which "should be asserted before a judicial, not a legislative, tribunal." The Report also added that greater efficiency and justice would be secured "from the separation of the legislative and judicial functions." H. Rept. No. 1077, 49th Cong., 1st Sess., pp. 4, 5.[9]

The Congress in re-enacting a statute is presumed to have adopted the construction given to the same language in the prior statute. See, *e.g.*, *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948), and cases there cited. In re-enacting as part of the Tucker Act the statutes governing the jurisdiction of the Court of Claims, the Congress must, therefore, have accepted the then settled view that the Court of Claims exercised this jurisdiction under Article III of the Constitution and elected to continue the Court of Claims in existence under Article III as a constitutional court.

Thus, when *Bakelite* came up for decision in 1929, the legislative-court doctrine of the *Canter* case had been limited to territorial and other courts situated outside the boundaries of the United States proper, and the Court of Claims seemed to be firmly established as a constitutional court. *Bakelite*, of course, directly involved the status of

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[9] The concurrent jurisdiction under the Tucker Act of the Court of Claims and the district courts has been a considerable embarassment to those who would classify the Court of Claims as a legislative court. Insofar as we have discovered, there is not even a hint in the legislative history of the Tucker Act that the Congress invoked its Article I power to pay the debts of the United States in conferring jurisdiction upon the Court of Claims, and invoked its Article III power in conferring the identical jurisdiction upon the district courts. *Williams* suggested that judicial power may be conferred apart from Article III upon constitutional as well as upon legislative courts (289 U.S., at p. 565), but *O'Donoghue*, decided the same day, expressed the orthodox view that the district courts, other than in the District of Columbia, can exercise only Article III jurisdiction (289 U.S., at p. 546), and that view was a cornerstone of the *Bakelite* decision (279 U.S., at p. 449). See the diversity of opinion on this issue in *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582, 592-594, 609-611, 640-642, 647-649 (1949).

only the Court of Customs Appeals. In holding that Court to be a legislative court, however, *Bakelite* in *dicta* assigned the same classification to a wide variety of courts, including the Court of Claims and the District of Columbia courts, and implicitly rejected the previously accepted limitations on the *Canter* doctrine.

The *Bakelite* opinion stated that "the true test lies in the power under which the court was created and in the jurisdiction conferred," in rejecting a contention that the tenure of the judges should be decisive because that contention "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress. . . ." 279 U.S., at p. 459.[10] No authority was cited for this "true test," and it does not appear to have been enunciated in any of the numerous prior cases in which the issue had been raised. Moreover, "the power under which the court was created" is merely a restatement of the issue of whether a particular court is legislative (created under Article I) or constitutional (created under Article III), and thus does not appear to be a "test" at all unless (as was denied) it refers to congressional intent. While "the jurisdiction conferred" obviously may be important, it had not

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[10] Despite this seeming rejection of the relevance of congressional intent, the *Bakelite* opinion found "propriety in mentioning the fact that Congress has always treated" the Court of Claims as a legislative court in that "Congress has required it to give merely advisory decisions on many matters." 279 U.S., at p. 454. *Bakelite* also relied on two cases in which this Court had refused to accept jurisdiction of appeals from advisory decisions of the Court of Claims as demonstrating that "this Court plainly was of the opinion that the Court of Claims is a legislative court. . . ." 279 U.S., at pp. 454-455. However, *Gordon* v. *United States, supra,* and *In re Sanborn,* 148 U.S. 222 (1893), merely applied the rule that this Court will not review non-final judgments and nowhere describe the Court of Claims as a legislative court. We have already shown that this Court has consistently reviewed final judgments of the Court of Claims, and, as we shall show, *O'Donoghue* v. *United States, supra,* subsequently held that the existence of advisory jurisdiction is not inconsistent with Article III status. See pp. 33-34, *infra.*

previously been thought to be decisive. The territorial courts often were given "the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. . . ." *Reynolds* v. *United States,* 98 U.S. 145, 154 (1878); see, also, *Mookini* v. *United States,* 303 U.S. 201, 205 (1938); *The "City of Panama,"* 101 U.S. 453 (1879); *Hornbuckle* v. *Toombs,* 18 Wall. 648, 656 (1873); *Clinton* v. *Englebrecht,* 13 Wall. 434, 447 (1871). The Florida superior court involved in the *Canter* case was conferred the same jurisdiction "within its limits, in all cases arising under the laws and constitution of the United States, which . . . was vested in the court of Kentucky district." 1 Peters, at p. 543.

Bakelite deemed significant the fact that the Court of Claims and Court of Customs Appeals were "created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." 279 U.S., at p. 451; see, also, pp. 452, 457-458. But this cannot be determinative that the particular judicial tribunal to which such power is committed by the Congress, in its discretion, is a legislative rather than a constitutional court. The federal district courts have often been entrusted with such jurisdiction, as in the Tucker and Tort Claims Act, yet undoubtedly are constitutional courts.[11]

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[11] The references in *Bakelite* to the Court of Claims as a "special tribunal" may indicate that the limited nature of its jurisdiction was a factor contributing to the conclusion reached. If so, that consideration sub-

The *O'Donoghue* and *Williams* cases were decided on the same day in 1933, four years after *Bakelite*. Both cases grew out of a statute (47 Stat. 402) reducing the compensation of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." *O'Donoghue* held that the judges of the District of Columbia courts came within the exception, rejecting the *dictum* in *Bakelite* that such courts were legislative courts. *Williams,* on the other hand, followed the *Bakelite dictum* that the Court of Claims is a legislative court and held that the statute applied to reduce the compensation of the judges of that Court.

O'Donoghue reverted to the explanation of *Canter* and the other decisions holding territorial courts to be legislative courts as being based on "the transitory character of the territorial governments," 289 U.S., at p. 536, and thus inapplicable to the District of Columbia courts. The "purely provisional" nature of the territorial courts provides justification for the observation in *Canter* that they "are incapable of receiving" Article III judicial power, but "we are unable to perceive upon what basis of reason it can be said that these courts of the District are *incapable* of receiving the judicial power under Art. III." 289 U.S., at pp. 544-545. Moreover, the "fact that Congress, under another and plenary grant of power, has conferred upon

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sequently was rejected in *Lockerty* v. *Phillips*, 319 U.S. 182 (1943), which held the Emergency Court of Appeals to be an Article III court. The jurisdiction of that Court, of course, was much narrower than the jurisdiction of the Court of Claims. As *Lockerty* pointed out: "The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" *Id.*, at p. 187. This long-established rule demonstrates the fallacy in petitioner's contention (Br., p. 14) that Congress must have granted the Court of Claims all the jurisdiction mentioned in Article III in order for Congress to have intended to create the Court of Claims as a constitutional court.

these courts jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters, does not affect the question." 289 U.S., at p. 545. "Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior courts in the District of Columbia as in the states, whether it has done so in any particular instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article?" 289 U.S., at p. 546.

O'Donoghue thus enunciated a different "test" for determining the proper classification of a judicial tribunal than did *Bakelite*. Under *O'Donoghue*, a court is an inferior court established under Article III if its jurisdiction extends to cases of the kind enumerated in Article III, and regardless of whether it may also have jurisdiction over non-Article III matters.[12] *O'Donoghue* also held that the tenure during good behavior conferred upon the judges of the District of Columbia courts, and other circumstances in which they had been treated in the same manner as federal district judges, "indicates, with some degree of persuasive force, that Congress entertained the view that the courts of the District and the inferior courts of the United States sitting elsewhere, stood upon the same constitutional footing. In any event, it is not without significance that in the acts of Congress from the beginning of the government to the present day, nothing has been brought to our attention which is inconsistent with that view." 289 U.S., at pp. 549-550. Thus, contrary to *Bakelite*, the intent of the Congress was considered to be significant and life tenure

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[12] This test does not explain the territorial court cases, but as noted, *O'Donoghue* viewed those cases as being based upon the temporary nature of territorial governments which made them incapable of receiving Article III judicial power.

during good behavior relied upon as indicating an intent to create a constitutional court.[13]

In holding the Court of Claims to be a legislative court, *Williams* relied heavily upon the *dictum* to that effect in *Bakelite,* which was said to have been "the result of a careful review of the entire matter," and upon the similarity between the Court of Claims and the Court of Customs Appeals insofar as this issue is concerned. 289 U.S., at pp. 570-571. The contrary views expressed in numerous cases prior to *Bakelite* were said to have been expressed "more or less irrelevantly." 289 U.S., at p. 568. Apparently in deference to the test stated in *O'Donoghue,* however, *Williams* went on to hold that the Court of Claims does not exercise jurisdiction over cases of the kind enumerated in Article III because Article III jurisdiction over "Controversies to which the United States shall be a Party" means only those controversies to which the United States is a party *plaintiff*. 289 U.S., at pp. 571-578. The intention of the Congress in creating the Court of Claims was referred to only by quotation of that part of the *Bakelite* opinion expressing the view that the advisory jurisdiction given to the Court of Claims in some cases demonstrates that the Congress has treated it as a legislative court. 289 U.S., at p. 569.

We believe that *Williams* erred in holding that the Court of Claims does not exercise Article III jurisdiction and in adopting the conclusion in *Bakelite* that the Congress intended to create the Court of Claims as a legislative rather than a constitutional court. Because of the importance of these determinations to the ultimate holding

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[13] See Watson, *The Concept of the Legislative Court,* 10 G.W.L.R. 799, 819-822 (1942), where the conclusion is reached that after *O'Donoghue* intent is the most important criterion.

that the Court of Claims is a legislative court, under the criteria established in *O'Donoghue* and presumably applied in *Williams,* we shall consider each of them in separate sections of this brief. Before doing so, however, it seems appropriate to conclude our discussion of the development of the concept of legislative courts with a brief account of pertinent occurrences subsequent to the *O'Donoghue* and *Williams* decisions in 1933.

United States v. *Sherwood,* 312 U.S. 584, 587 (1941), cited *Williams* and *Bakelite* for the proposition that the Court of Claims "is a legislative, not a constitutional court," which derives its judicial power "from the Congressional power 'to pay the debts . . . of the United States' " rather than from Article III. The status of the Court of Claims was not at issue in the case, however, and this statement was a *dictum* unnecessary to the decision.[14]

The Solicitor General, who had advocated the result reached in *Williams,*[15] concluded, after further consideration, that *Williams* had been wrongly decided and urged, in *Pope* v. *United States,* 323 U.S. 1 (1944), that *Williams*

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[14] *Sherwood* also suggested that the status of the Court of Claims as a legislative court, as well as "the power of the sovereign to attach conditions to its consent to be sued," was a basis for the established rule "that Congress, despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims." 312 U.S., at p. 587. However, *McElrath* v. *United States,* 102 U.S. 426 (1880), which first upheld the absence of jury trial in cases before the Court of Claims, relied entirely upon the power of the Congress to condition its consent to be sued. *McElrath* was decided, of course, during the period prior to *Bakelite* when the Court of Claims had consistently been categorized by this Court as a constitutional court, and demonstrates that there is no inconsistency between that view and the fact-finding procedures of the Court of Claims.

[15] On the ground that *Bakelite* was "a direct and conclusive authority." 289 U.S., at p. 523. The Solicitor General had, however, argued in *Bakelite* that the Court of Customs Appeals was a constitutional court. 279 U.S., at p. 445.

be overruled. But this Court found "no occasion to consider what effect the imposition of non-judicial duties on the Court of Claims may have affecting its constitutional status as a court and the permanency of tenure of its judges," because it was enough for purposes of the issue before the Court "that, although the Court of Claims, like the courts of the District of Columbia, exercises non-judicial duties, Congress has also authorized it as an inferior court to perform judicial functions whose exercise is reviewable here." *Id.*, at pp. 13-14.

The most recent significant decision of this Court for present purposes is that in *National Ins. Co.* v. *Tidewater Co.*, 337 U.S. 582 (1949). That decision held that the federal district courts could be given diversity jurisdiction over cases between citizens of the District of Columbia and citizens of a state, but the members of the majority were not able to agree upon a common ground. Three members of the majority, in an opinion by Mr. Justice Jackson, were of the view that such jurisdiction could be conferred under the Article I power of the Congress over the District of Columbia, although not under Article III, relying in part upon *Williams*. See *id.*, at pp. 592-594. All other members of the Court, however, rejected this view in opinions which evinced disagreement with the holding in *Williams* that the Court of Claims does not exercise Article III jurisdiction.[16]

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[16] Justices Rutledge and Murphy concurred in the *Tidewater* decision, but on the ground that the District of Columbia is a "State" for purposes of diversity jurisdiction under Article III. In an opinion by Mr. Justice Rutledge, they expressed the view that the Tucker Act jurisdiction of the Court of Claims and the district courts came within the federal-question jurisdiction of Article III, even assuming that *Williams* correctly held Article III jurisdiction over suits to which the United States "shall be a Party" was limited to suits in which the United States is the plaintiff. *Id.*,

C. *The Standards for Classifying A Court As Constitutional or Legislative in Nature.* The foregoing account of the development of the concept of legislative courts reveals the difficulties which this Court has experienced in rationalizing that concept. None of the various rationales which have been put forward from time to time seems to us to be wholly satisfactory. The basic problem, and one which we doubt can be successfully overcome insofar as logic or constitutional theory is concerned, is that the legislative-court concept is not compatible with the language and purposes of Article III or with the separation of powers principle expressed in the Constitution as a whole. If the Article I power of the Congress to pay the debts of the United States authorizes the Congress to establish a court for the exercise of judicial power over claims against the United States apart from Article III and without being subject to the provisions of that Article, the Article I power of the Congress over interstate commerce, for example, should similarly authorize the Congress to establish legislative courts for the exercise of judicial power with respect to issues arising under substantive laws enacted pursuant to the commerce clause. There would seem to be no barrier to the transfer of all federal-question jurisdiction to legislative courts for determination by judges unprotected as to tenure and compensation and thus dependent upon the legislative and executive bodies in a manner which Article III was intended to avoid.

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at pp. 609-610. Chief Justice Vinson, joined by Mr. Justice Douglas, dissenting, agreed, although they thought *Williams* could be justified on another ground. *Id.*, at pp. 640-642, fns. 20, 21. Mr. Justice Frankfurter, joined by Mr. Justice Reed, dissenting, also appeared to agree that the Tucker Act invoked Article III federal-question jurisdiction. *Id.*, at p. 649.

Accepting the fact that the legislative-court doctrine has become too deeply entrenched to be uprooted altogether, the *O'Donoghue* case, in our opinion, adopted a statesman-like accommodation of that doctrine with the language and purposes of Article III. *Canter* and similar cases dealing with the courts of the territories or other extraterritorial courts are to be confined to their own special niche, rather than treated as merely one aspect of a general theory of legislative courts as was attempted in the *Bakelite* opinion. For such courts, it suffices to say that they are "incapable of receiving" Article III judicial power because of their presumably temporary nature or because Article III has historically been considered to be inapplicable outside the limits of the United States proper. But this explanation will not do, as *O'Donoghue* held, for the District of Columbia courts which are situated within the bounds of the United States and which from all that appears were intended to be as permanent as the nature of things allows. The Court of Claims also is situated within the bounds of the United States proper and from all the evidence is a relatively permanent institution, so that it equally will not do to say that the Court of Claims is "incapable of receiving" Article III power.

For such institutions which are not "incapable of receiving" Article III power and which the Congress could establish as inferior courts under Article III, *O'Donoghue* holds that whether the Congress "has done so in any particular instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by additional congressional legislation, enacted under Article I . . . . imposing upon such courts other duties . . . . The two powers

are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause [in Article I] of the Constitution may be used to destroy the operative effect of the judicial clause within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and adequate." 289 U.S., at p. 546.

The "inquiry" thus posed in *O'Donoghue* accords with the purposes of Article III and provides an appropriate means for distinguishing true courts exercising judicial power from administrative agencies exercising executive or delegated legislative powers.[17] If the Congress confers upon an institution the power to render final judgments with respect to any cases of the kind enumerated in Article III, then that institution is an Article III court and its members are judges entitled to the protections provided in Article III with respect to their tenure and compensation. This protection of the independence of the institution in question cannot be destroyed by the fact that the Congress may have, and may have exercised, the power under Article I to confer non-judicial functions on that institution. Hence, all federal judicial power of the kind encompassed by Article III will be exercised by independent Article III courts, except in the territories or otherwise outside the limits of the United States proper where unique circumstances may justify an exception. As *O'Donoghue* also illustrates, if there is any doubt as to whether a particular institution was intended by the Congress to be an

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[17] *Old Colony Tr. Co.* v. *Comm'r Int. Rev.*, 279 U.S. 716, 726 (1929), for example, held the Board of Tax Appeals, now the Tax Court, to be an administrative agency rather than a court. Since the Tax Court is expressly declared to be "an independent agency in the Executive Branch of the Government," 26 U.S.C. § 7441, it is difficult to see how any other conclusion could be reached. See *Commissioner* v. *Gooch Co.*, 320 U.S. 418, 420 (1943).

Article III court exercising Article III judicial power, the tenure provided and other indicia of the intent of the Congress may be consulted.

The standards proclaimed in *O'Donoghue* are the most recent expression by this Court on the subject,[18] as well as affording an appropriate accommodation of Article III with the legislative-court doctrine. While *Williams* is somewhat confusing in that it quotes extensively from the *Bakelite* opinion which applied a wholly different test, there is every reason to believe that this Court in *Williams* accepted and sought to apply the views expressed in *O'Donoghue*. The *O'Donoghue* and *Williams* opinions were both written by Mr. Justice Sutherland and were delivered on the same day. As we have shown, *Williams* held that the Court of Claims did not exercise any jurisdiction over cases of the kind enumerated in Article III, and adopted the *Bakelite* view that the Congress has consistently treated the Court of Claims as a non-Article III institution. See pp. 35-36, *supra*. If those conclusions were correct, then the Court of Claims would not be an Article III court under the standards established in *O'Donoghue*. But, as we now attempt to demonstrate, those conclusions with respect to the nature of the jurisdiction of the Court of Claims and to the intent of the Congress were in error.

D. *The Court of Claims Exercises Article III Jurisdiction.* The principal jurisdiction of the Court of Claims is that conferred by the Tucker Act over "any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an

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[18] While all the opinions in the *Tidewater* case touched upon this problem, none did so in detail and, of course, none was joined by a majority of the Court.

executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491. Concurrent jurisdiction over such claims, where not exceeding $10,000 in amount, also was conferred by the Tucker Act upon the federal district courts. 28 U.S.C. § 1346(a)(2). A number of statutes confer jurisdiction upon the Court of Claims to render judgments upon claims against the United States arising from particular circumstances.[19] Appellate jurisdiction is exercised by the Court of Claims over determinations of the Indian Claims Commission, 25 U.S.C. § 70s, and over final judgments of the federal district courts in cases arising under the Tort Claims Act where the appellees consent in writing to the taking of an appeal to the Court of Claims, 28 U.S.C. § 1504. Finally, the Court of Claims has "jurisdiction to report to either House of Congress on any bill referred to the court by such House, except a bill for a pension, and to render judgment if the claim against the United States is . . . one over which the court has jurisdiction under other Acts of Congress." 28 U.S.C. § 1492.

The Court of Claims renders final judgment (subject to review by this Court) on cases brought under the

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[19] The Court of Claims has jurisdiction to: determine the amount due to or from the United States on certain unsettled accounts of its officers, agents and contractors, 28 U.S.C. § 1494; render judgment upon claims for damages by persons unjustly convicted and imprisoned by the United States, 28 U.S.C. § 1495; render judgment upon certain claims by federal disbursing officers, 28 U.S.C. § 1496; render judgment upon certain claims for damages to oyster growers, 28 U.S.C. § 1497; award compensation for use or manufacture of patented articles without license or other lawful right, 28 U.S.C. § 1498; render judgment on claims for certain penalties withheld by the United States, 28 U.S.C. § 1499; render judgment upon any set-off or demand asserted by the United States against a plaintiff, 28 U.S.C. § 1503; determine certain Indian claims, 28 U.S.C. § 1505; and to render judgment on claims transmitted by the Comptroller General and which would be within the jurisdiction of the Court if voluntarily brought by the claimant, 28 U.S.C. § 2510.

jurisdiction thus conferred, with the very limited exception of congressional reference cases not otherwise within the jurisdiction of the Court. The United States is a party to all of the cases brought in the Court of Claims, and Article III of the Constitution expressly provides that the "judicial Power shall extend . . . to Controversies to which the United States shall be a Party. . . ." *Williams* held, however, that this language in Article III should not be given its plain meaning, but rather is to be construed as extending the judicial power of the United States only to those controversies in which the United States is a party *plaintiff*. Since the United States is the defendant in litigation brought in the Court of Claims, *Williams* concluded that the Court of Claims was not exercising Article III judicial power in deciding that litigation. 289 U.S., at pp. 571-578.

We believe that the restricted interpretation given by *Williams* to "Controversies to which the United States shall be a Party" cannot be justified from the language and history of Article III or in reason. But assuming, *arguendo,* that that interpretation was proper and should be adhered to, *Williams* erred in failing to consider and to recognize that the Court of Claims exercises federal-question jurisdiction within the meaning of the provision in Article III extending the judicial power to all cases "arising under this Constitution [and] the Laws of the United States. . . ."

The language, "Controversies to which the United States shall be a Party," could hardly be plainer. Certainly, "party," when used in connection with a case or controversy and without a qualifying adjective, normally would not be understood as necessarily referring to the plaintiff. It is almost beyond belief that the framers of a document as carefully drafted as the Constitution of the United States would have failed to use the language "con-

troversies to which the United States shall be a plaintiff" if that was what they intended. *Williams* did not refer to anything said in the debates at the Constitutional Convention to support its interpretation, and we have not discovered any such support.[20]

The term "party" also appears in that part of Article III conferring upon this Court original jurisdiction over all cases "in which a State shall be a Party." In the early and well-known case of *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), this Court accepted original jurisdiction of an action brought against the State of Georgia by a citizen of another state. The attorney for the plaintiff was Edmund Randolph, a member of the Constitution Convention and Attorney-General of the United States at the time. He argued, among other things, that (2 Dall., at p. 420):

> "1st. The constitution vests a jurisdiction in the supreme court over a state, as a defendant, at the suit of a private citizen of another state. Consult the letter of the constitution, or rather the influential words of the clause in question. The judicial power is extended to controversies between a state and citizens of another state. I pass over the word 'between,' as in no respect indicating who is to be plaintiff or who defendant. In the succeeding paragraph, we read a comment on these words, when it is said that in cases in which a state shall be a *party* the supreme court shall have original jurisdiction. Is not a defendant a *party,* as well as a plaintiff?" (Emphasis in the original.)

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[20] Madison's Journal of the Constitutional Convention shows that the language in question was inserted in Article III by an amendment proposed by Madison and by Gouverneur Morris, which amendment was approved apparently without opposition or debate. See III Documentary History of the Constitution of the United States of America 626 (Department of State, 1900).

Mr. Justice Blair, also a member of the Constitutional Convention, stated in his opinion (2 Dall., at p. 451) that:

> "After describing, generally, the judicial powers of the United States, the constitution goes on to speak of it distributively, and gives to the supreme court original jurisdiction, among other instances, in the case where a state shall be a *party;* but is not a state a party as well in the condition of a defendant, as in that of a plaintiff? And is the whole force of that expression satisfied, by confining its meaning to the case of a plaintiff-state? It seems to me, that if this court should refuse to hold jurisdiction of a case where a state is a defendant, it would renounce part of the authority conferred, and consequently, part of the duty imposed on it by the constitution; because, it would be a refusal to take cognisance of a case, where a state is a party."

Mr. Justice Wilson, another member of the Constitutional Convention, in deciding that "the state of Georgia is amenable to the jurisdiction of this court," stated that this view was "confirmed, beyond all doubt, by the direct and explicit declaration of the constitution itself." 2 Dall., at p. 466. He referred, particularly, to the provision of Article III extending the judicial power to "Controversies between two or more States" as demonstrating conclusively that there was no intention to exclude jurisdiction of cases in which a state was a defendant. Justices Blair and Wilson were joined by Chief Justice Jay, one of the authors of The Federalist, and by Justice Cushing, while Justice Iredell dissented.

The ruling in *Chisholm* v. *Georgia,* made some six years after the Constitution was drafted and participated in by prominent members of the Constitutional Convention,

seems to us virtually conclusive that the term "party" as used in Article III was not intended to be limited to plaintiffs. It is hardly conceivable that the term as used in the phrase extending the judicial power to controversies "to which the United States shall be a Party" was intended to refer only to the United States as a plaintiff, if the term as used in the phrase conferring original jurisdiction upon this Court over cases "in which a State shall be a Party" applies whether the state is a plaintiff or a defendant.

The Eleventh Amendment to the Constitution, adopted in reaction to the decision in *Chisholm* v. *Georgia, supra,* withdrew from the federal courts all jurisdiction over suits against a state by citizens of another state or of a foreign nation. But with respect to those cases and controversies to which Article III judicial power continued to extend, an original action still may be brought in this Court against a state. Thus, *United States* v. *Texas,* 143 U.S. 621, 643-644 (1892), held that the original jurisdiction of this Court in cases to which a state shall be a party "necessarily refer[s] to all cases mentioned in the preceding clause [of Article III] in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff." See, also, *Minnesota* v. *Hitchcock,* 185 U.S. 373, 388 (1902); *Kentucky* v. *Denison,* 24 How. 66, 98 (1860). This doctrine was recently reaffirmed in the Tidelands cases. See *United States* v. *Louisiana,* 339 U.S. 699, 701-702 (1950); *United States* v. *Texas,* 339 U.S. 707, 709-710 (1950).

In *Minnesota* v. *Hitchcock, supra,* this Court expressly held that the judicial power over controversies to which the United States shall be a party included cases in which the United States is a party defendant. That was an original action by Minnesota in this Court to enjoin the

Secretary of Interior and the Commissioner of the General Land Office. In order for such jurisdiction to attach, the State had to establish that the case came within one of the categories in paragraph 1, section 2 of Article III to which the judicial power of the United States extends. 185 U.S., at p. 383. This Court held that:

> "This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant." 185 U.S., at p. 384.
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> "While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition." 185 U.S., at p. 386.

See, also, *Kansas* v. *United States*, 204 U.S. 331, 342 (1907).

The most tangible reason given by the *Williams* opinion for overruling *Hitchcock* and rewriting the plain language of the Constitution was that, because of the sovereign immunity of the United States from suit, "it is not reasonably possible to assume that it was within the contemplation of the framers of the Constitution that the words, 'controversies to which the United States shall be a party,'

should include controversies to which the United States shall be a party *defendant.*" 289 U.S. at p. 577.[21] *Hans* v. *Louisiana,* 134 U.S. 1 (1890), was strongly relied upon for this proposition. That case held that a state could not be sued in the federal courts by one of its citizens, without its consent, under that part of Article III extending the judicial power to cases arising under the laws and Constitution of the United States. In so ruling, the majority opinion animadverted on the decision in *Chisholm* v. *Georgia, supra,* and expressed agreement with the dissent of Mr. Justice Iredell in that case. (But see *South Dakota* v. *North Dakota,* 192 U.S. 286, 318 (1904), where this court refused to be bound by the approval in *Hans* of the Iredell dissent and took jurisdiction of a suit by one state against another even though the defendant state had not consented to suit.)

With all due respect, we submit that *Williams* missed the point of the *Hans* decision and of Justice Iredell's dissent.

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[21] *Williams* also relied upon the fact that the provision relating to "controversies to which the United States shall be a party" omitted the word "all" which is found in provisions relating to certain other jurisdictional categories, such as "all cases of admiralty and maritime jurisdiction." 289 U.S., at pp. 572-573. But as Mr. Justice Story pointed out, in *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 334-336 (1816); "In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power . . . to *all* cases; and in the latter class, to leave it to congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate." Thus, "although it might be fit, that the judicial power should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively given, lest it should imply a right to take cognisance of original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognisance, either to enforce rights or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which congress might, in their wisdom, choose to apply." See, also, II Story On the Constitution, § 1675, p. 459 (4th ed.).

They did not hold or contend that the judicial power never could extend to a case in which a state was a defendant, but only that a state could not be made a defendant without its consent; *i.e.*, unless the state waived its sovereign immunity. Thus, *Hans* said that the "suability of a State *without its consent* was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm* v. *Georgia*; . . ." 134 U.S., at p. 16 (emphasis added). "Undoubtedly a State may be sued by its own consent, as was the case in *Curran* v. *Arkansas et al.*, 15 How. 304, 309, and in *Clark* v. *Barnard*, 108 U.S. 436, 447." 134 U.S., at p. 17. The *Barnard* case referred to was one brought in a federal court in which a state was held to have consented to suit by entering a voluntary appearance. The Eleventh Amendment provides "an immunity which a State may waive at its pleasure . . . as by a general appearance in litigation in a federal court . . . or by statute." *Petty* v. *Tennessee-Missouri Comm'n.*, 359 U.S. 275, 276 (1959).

While Justice Iredell's dissent is not as clear as it might be, he nowhere explicitly objected to the holding of the majority in *Chisholm* v. *Georgia* that this Court's original jurisdiction over cases "in which a State shall be a Party" extended to cases in which a state was a defendant. His objection appears to have been directed at the further holding of the majority that Georgia did not have the defense of sovereign immunity to the claim made in that suit, because such immunity had been waived by ratification of the Constitution, or because the states were no longer sovereigns, or because the concept of sovereign immunity should not be adopted in this country—all of which were suggested in one or more of the separate opinions written

by the four Justices in the majority. Mr. Justice Iredell based his dissent on the premise that (2 Dall., at p. 436):

> "The authority extends only to the decision of controversies in which a state is a party, and providing laws necessary for that purpose. That surely can refer only to controversies in which a state *can* be a party; in respect to which, if any question arises, it can be determined, according to the principles I have supported, in no other manner than by reference either to pre-existent laws, or laws passed under the constitution and in conformity to it." (Emphasis in the original.)

He then examined the petition of right and other actions in which a suit against the Crown had been permitted, and determined to his satisfaction that they were inapplicable to the suit at bar. 2 Dall., at pp. 436-448.

The *seriatim* opinions in *Chisholm* v. *Georgia*, including that of Justice Iredell in his discussion of the petition of right, show that the concept of waiver of sovereign immunity was known when the Constitution was adopted.[22] In the debates at the Virginia Convention on ratification of the Constitution, Madison defended the provision of Article III conferring jurisdiction over controversies between a state and a foreign nation, as he did not "conceive that any controversy can ever be decided, in these [Article III] courts, between an American state and a foreign state, without the consent of the parties. If they consent, provision is here made." Similarly, Marshall at the same Con-

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[22] Appendix B to the Brief for the United States in *Pope* v. *United States*, 323 U.S. 1 (1944), contains a detailed resume of the development of the concept of sovereign immunity, and demonstrates that this concept was recognized both in English law and in the States prior to adoption of the Constitution. See, also, II Story On the Constitution, § 1678, pp. 460-462 (4th ed.).

vention and with respect to the same subject, stated that: "The previous consent of the parties is necessary; and, as the federal judiciary will decide, each party will acquiesce." See *Monaco* v. *Mississippi*, 292 U.S. 313, 323-324 (1934), where these statements are quoted and which held that a foreign nation may not invoke the original jurisdiction of this Court over suits to which a state is a party *except* where the state has consented to suit.[23]

It is difficult to believe that the framers of the Constitution did not contemplate the possibility that the United States, as well as its component states, might waive its sovereign immunity so as to be amenable to suit, or that Article III was intended to extend the judicial power to suits against the states when such consent is given but not to suits against the United States when such consent is given as in the Tucker Act. We are convinced, therefore, that suits against the United States in the Court of Claims are "Controversies to which the United States shall be a Party" to which the judicial power extends under Article III, and that *Williams* erred in holding to the contrary.

Assuming, however, that *Williams* was correct in this holding, the opinion in that case failed to consider the possibility that the Court of Claims exercises Article III judicial power by reason of the provision extending that power to cases arising under the Constitution and laws of the United States. That the jurisdiction conferred by the Tucker Act comes under this category of Article III judicial power seems to have been the view of six of the Justices in the *Tidewater* case. See p. 37, fn. 16, *supra*. We do not see how any other conclusion can be reached

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[23] Hamilton, in The Federalist, No. 81, stated that: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." (Tudor Pub. Co. ed., 1937; emphasis in the original.) See, also, *Cohens* v. *Virginia*, 6 Wheat. 264, 378 (1821).

with respect to Tucker Act jurisdiction over claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department. . . ." Tucker Act jurisdiction over claims founded "upon any express or implied contract of the United States," extends only to those contracts authorized by statute, *Eastern Extension Tel. Co.* v. *United States,* 251 U.S. 355 (1920), so that such claims also arise under the laws of the United States. "Congress can authorize the making of contracts; it can therefore authorize suit thereon in any district court." *National Ins. Co. v. Tidewater Co., supra* at p. 649 (dissenting opinion of Mr. Justice Frankfurter). Moreover, as Chief Justice Vinson contended in the *Tidewater* case, *supra* at pp. 641-642, fn. 21: "Since any right of action against the United States is completely and wholly dependent upon whether an Act of Congress has authorized the suit . . ., a question arising under the laws of the United States, as that phrase is used in Art. III, is clearly presented by any claim against the federal government."

For the reasons stated, we believe that the Court of Claims does exercise Article III judicial power, that *Williams* erred in reaching the contrary conclusion, and that that erroneous conclusion was fundamental under the standards established in the *O'Donoghue* case to the ultimate holding in *Williams* that the Court of Claims is a legislative court. Should there be any remaining doubt that the Court of Claims was created as a constitutional court to exercise Article III judicial power, however, it is appropriate, as *O'Donoghue* holds, to look to the tenure of the judges and other indicia of the intent of the Congress. We demonstrate in the next section of this brief that the Congress undoubtedly intended to create the Court of Claims under Article III and for that Court to exercise Article III judicial power.

E. *The Congress Intended to Create the Court of Claims under Article III.* The statutes governing the constitution and operation of the Court of Claims have always, since that Court was first established in 1855, provided life tenure during good behavior for the judges of the Court. The same circumstance with respect to the judges of the District of Columbia courts was said by *O'Donoghue* to indicate "with some degree of persuasive force" that such courts "stood upon the same constitutional footing" as did the other federal district courts. 289 U.S., at pp. 549-550. We need not rely upon that factor alone, however, because the legislative history of the statutes basic to the creation of the Court of Claims establishes beyond any reasonable doubt, we believe, that the Congress intended to create the Court of Claims under Article III as a constitutional court.

The status of the Court of Claims in the governmental hierarchy was developed and, it was supposed, determined during the first eleven years of its existence. The bill initially introduced, in 1854, proposed the establishment of a board of three commissioners. Cong. Globe, 33d Cong., 2d Sess., p. 70. Senator Hunter stated that he would "vastly prefer, on account of the tenure, that, instead of commissioners appointed for four or five years, and removable at the pleasure of the President, we should have two judges sitting here, who should hold their offices as judges do under the Constitution of the United States;" thus, he was in favor of a "court" rather than a board of commissioners. *Id.,* at p. 71. Senator Jones thought that "there is but one safe mode of doing it, and that is to establish a court of claims—an independent judiciary, upon the same principle as the Supreme Court." *Id.,* at p. 74. Others spoke in favor of a court, only Senator Brodhead supported a board of commissioners, and the

bill was referred back to a select committee, on motion of Senator Jones, "to make a bill that may be acceptable to all." *Id.*, at p. 73; see, generally, pp. 71-74.

The select committee reported back an amended bill providing for a "Court of Claims" of three judges holding office during good behavior. *Id.*, at pp. 105-106. Senator Weller proposed an amendment to create a board of commissioners, because: "Under the Constitution of the United States, if there be a court established, the judges of that court are to be appointed during good behavior." *Id.*, at p. 107. After considerable debate, this proposed amendment was rejected. *Id.*, at pp. 107-114. Senator Hunter stated that there were only two alternatives—a court whose members would have tenure during good behavior or a board whose members could be removed at any time by the President, and that the nature of the tribunal proposed and of its jurisdiction made particularly important that it be an independent court. *Id.*, at pp. 108-109. While Senators Weller, Chase and Butler did not see how a true court could be established unless given the power to render final judgments rather than the mere reports to Congress which were proposed (*id.*, at pp. 110, 112), Senators Stuart and Douglas disagreed and substantially concluded the debate by stating their belief that the bill would establish "a court under the provisions of the Constitution, and that the Constitution prescribes the tenure of office." *Id.*, at p. 113. Senator Clayton had expressed the same thought, and also noted that Article III judicial power expressly extended to controversies to which the United States shall be a party as would be true of "every one of these private claims on the government. . . ." *Id.*, at p. 111.

The Senate bill was passed by the House without debate. *Id.*, at p. 909. The Senate debates are sufficient to demonstrate, however, that the choice was believed to be between

a court established under Article III and staffed by judges holding office during good behavior as provided in Article III, and an administrative board or commission. The majority clearly elected to create an Article III court, even though they mistakenly thought that finality of judgment was not necessary for a judicial decision. Thus, the bill that became law on February 24, 1855, 10 Stat. 612, did not give finality to the decisions of the court which were made subject to review and approval by the Congress.

A few years later, President Lincoln recommended that the decisions of the Court of Claims be made final, stating that the "investigation and adjudication of claims, in their nature belong to the judicial department" and should be removed from the legislature. Cong. Globe, Dec. 3, 1861, Appendix, p. 2, 37th Cong., 2d Sess. A bill was introduced increasing the number of judges on the Court of Claims to five, making its judgments final, and providing for appeal from such judgments to the Supreme Court. In the House debates on this bill, it was generally recogized that the Court of Claims was a court only in name because its judgments lacked finality, and that the bill in effect would, as stated by Representative Diven, establish a new court with "all the paraphernalia and dignity of a court of the United States. . . ." Cong. Globe, 37th Cong., 2d Sess., p. 1672.[24] Whether this should be done was the principal issue in the debate.

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[24] See, also, statements of Representatives Porter, Watts, Bingham and Hickman. *Id.*, at pp. 1673-1674. Representatives Bingham (*id.*, at p. 1674) and Pendleton (*id.*, at p. 1676), in supporting the oill against objections that it was dangerous to permit the Court of Claims to render final judgments obligating the payment of money out of the Treasury, pointed out that the judges could be impeached for any misfeasance or malfeasance in office, thus implying that they could not otherwise be removed under the Constitution.

During the course of this debate, Representative Hickman, the Chairman of the Judiciary Committee, stated that the bill reported "proposes to make this organization a court, and to give it the powers of a court, and the determinations of a court," *id.*, at p. 1674, but stated that in his opinion the bill should provide for removal of the judges "at the pleasure of the Executive," that he saw no reason why this would not be feasible, and that he intended to offer an amendment to that effect. *Id.*, at p. 1675. The following colloquy then occurred (*id.*, at p. 1675):

> "Mr. SHELLABARGER: I wish to make an inquiry of the learned chairman of the Judiciary Committee. I understand him to take the ground—and I suppose it is the true one—that this is intended to be a court within the meaning of the Constitution. If that be so, then I wish to make an inquiry in relation to a point to which he has just alluded, and which is an important one, and which he proposes to bring before the House in the shape of an amendment. My inquiry is whether it is competent to provide that the judges of any court shall be removable at the pleasure of the Executive—whether their tenure is not during good behavior?
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> "Mr. HICKMAN: Well, sir, the objection which has been raised by the gentleman from Ohio proves conclusively that the present is no court. The suggestion which he has made proves that conclusively; and if the amendment which I have suggested is objectionable—and it may be so; it occurred to me on the spur of the moment—of course I do not insist upon it. It strikes me that it may be objectionable."

Representative Hickman in fact did not insist upon his proposed amendment, and the bill as passed by the House shortly thereafter (*id.*, at p. 1677) and eventually enacted

(12 Stat. 765) provided the judges of the Court of Claims with life tenure during good behavior. In the light of this colloquy, there is little room for doubt that the House intended the Court of Claims to be a constitutional court established under Article III when that Court was substantially reconstituted in 1863. While this issue was not sharply raised during the Senate debate on the bill passed by the House, it seems relatively clear that the Senate shared the same purpose.[25]

The statute thus enacted in 1863 expressly made judgments of the Court of Claims final and provided for appeal to the Supreme Court. The statute also included a provision, however, that no money should be paid out of the Treasury on any claim adjudicated by the Court of Claims until an appropriation therefor had been estimated by the Secretary of the Treasury.[26] We have already referred to the holding in *Gordon* v. *United States, supra,* that this

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[25] Senator Trumbull, in reporting the bill, stated that the Court of Claims had been initially established "with a view of sending all claimants to a judicial tribunal," but this purpose had failed of achievement because the judgments of the Court of Claims were not final—which defect would be remedied by the proposed bill. Cong. Globe, 37th Cong., 3d Sess., p. 303. Senator Sherman referred to the Court of Claims as an "inferior tribunal" created by the Congress, and composed of persons "appointed to hold their office during good behavior." *Id.*, at p. 399. Senator Cowan rebutted an argument to the effect that no state had theretofore surrendered power over claims against it to a court, by pointing out that: "The Constitution of the United States provides that the judiciary shall have cognizance of all cases in which the United States is a party." *Id.*, at p. 416. Senator Bayard expressed the opinion that the determination of claims "ought to be a judicial act" rather than a matter for the legislature, noting, among other things, that Congress did not have tenure unlike the judges of the Court of Claims. *Id.*, at p. 419.

[26] The provision in question was added by an amendment proposed on the floor of the Senate, and approved without debate after the floor leader for the bill (Senator Trumbull) accepted the amendment and expressed the view that it made no change in established procedures. Cong. Globe, 37th Cong., 3d Sess., p. 426; see, also, Cong. Globe, 39th Cong., 1st Sess., p. 770.

provision subjected the judgments of the Court of Claims to administrative and legislative review so as to prevent such judgments from being final for purposes of appeal to this Court. Shortly thereafter, in 1866, the provision in question was repealed (14 Stat. 9) so as to remove this objection to review of Court of Claims judgments (see Cong. Globe, 39th Cong., 1st Sess., pp. 770-771), and, as we have shown, this Court subsequently has accepted jurisdiction of appeals from such judgments. See pp. 26-28, *supra*.

We submit, therefore, that the Congress in the first eleven years of the existence of the Court of Claims, during which its organization and jurisdiction were substantially settled, was constantly motivated by the purpose of constituting the Court of Claims as a true Article III court, acting promptly to correct deficiencies in the basic statutes which were found to interfere with that purpose. The judges of the Court of Claims were given life tenure during good behavior, and at no time did the Congress indicate anything other than a purpose to create a constitutional court under Article III.

We have already referred to the re-enactment, in the Tucker Act, of the basic jurisdiction of the Court of Claims at a time when decisions of this Court seemed to have settled the status of the Court of Claims as a constitutional court. See pp. 29-30, *supra*. That circumstance, together with the fact that the Tucker Act conferred concurrent jurisdiction upon the federal district courts, provides an additional indication of the consistent congressional treatment of the Court of Claims as an Article III court. Further evidence is provided by the appellate jurisdiction of the Court of Claims over decisions of the federal district courts under the Tort Claims Act, where the appellees consent in writing to the taking of an appeal to the Court

of Claims. 28 U.S.C. §1504. It is hardly conceivable that the Congress would have provided for such appeals from decisions of constitutional courts unless the Court of Claims was also considered to be a constitutional court. Finally, as we noted at the outset, the Congress in 1953 concluded after thorough consideration that the Court of Claims had initially been created as an Article III court and enacted a statute declaring it to be "a court established under article III of the Constitution of the United States." See pp. 13-14, *supra*.

Insofar as the *Williams* opinion reveals, the legislative history and other circumstances discussed above were not considered in reaching the conclusion that the Court of Claims was created as a legislative court. We believe that the intent of the Congress should be considered and given weight by this Court, and that the evidence of congressional intent set forth above buttresses our contention that the Court of Claims was created under Article III for the exercise of Article III judicial power.

II

The Status of the Court of Claims As A Constitutional Court Since the 1953 Act Cannot Validly Be Questioned

The Congress in 1953, as previously noted, enacted a statute which declares the Court of Claims "to be a court established under article III of the Constitution of the United States." 67 Stat. 226, 28 U.S.C. § 171. This statute was intended to express the conclusion of the Congress that the Court of Claims was initially created and has always existed under Article III (see pp. 13-14, *supra*), and obviously presents no problem if the contrary conclusion in *Williams* is overruled as we believe should be done for the reasons already stated. Certainly, the decision in *Wil-*

liams was not an easy one and we think it probable that a different conclusion would have been reached if this Court, when that case was decided, had had the benefit of the Congressional declaration contained in the 1953 Act. But even if *Williams* is reaffirmed in holding that the Court of Claims initially was created under Article I, the 1953 Act, as we show below, validly established the Court of Claims as an Article III court on and subsequent to the effective date of that Act.

Petitioner contends that the 1953 Act is "ineffectual," and presumably unconstitutional, because the "Congress is completely without power under the Constitution to alter the status of an Article I court *merely* by declaration of intention as to its constitutional status made many years after the court's creation. In other words, a court assumes a definite status at the time of its establishment and, absent changes in the character, function, power or jurisdiction of that court, such status constitutionally does not and can not change." (Br., p. 15.) The *Bakelite, Williams* and *Tidewater* cases are cited for this proposition, but none of those cases involved such a declaration by the Congress or even expressed any views upon the effect that such a declaration might have.[27]

Assuming, as we must for present purposes, that the Congress can establish courts for the exercise of judicial power under either Article I or Article III of the Constitution, we fail to see why the Congress should be

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[27] *Bakelite* did state that an argument as to congressional intent based on the tenure of the judges of the Court of Customs Appeals "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." 279 U.S., at p. 459. We have shown, however, that the subsequent *O'Donoghue* decision disregarded this "true test" and relied in part upon the intent of the Congress as disclosed by the life tenure given to the judges of the District of Columbia courts. See p. 34, *supra*.

"completely without power" to alter the status of an Article I court to that of an Article III court by an express statutory declaration to such effect. Nothing in the Constitution provides in effect that "once an Article I court always an Article I court," and we do not perceive any persuasive reason why such a rule should apply.

It is important to remember in this regard that the Court of Claims was held by *Williams* to exercise judicial power, even though not Article III judicial power; and *Williams* further held that this judicial power could be conferred upon an Article III court. After referring to the provisions of the Tucker Act, *Williams* said (289 U.S., at pp. 565-566) that:

> "By these provisions it is made plain that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. It is only in that view that the appellate jurisdiction of this court in respect of the judgments of that court could be sustained, or *concurrent* jurisdiction appropriately be conferred upon the federal district courts. The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution.
>
> "That judicial power apart from that article may be conferred by Congress upon legislative courts, as well as upon constitutional courts, is plainly apparent from the opinion of Chief Justice Marshall in *American Insurance Co.* v. *Canter,* 1 Pet. 511, 546, dealing with the territorial courts. . . . The validity of this

> view is borne out by the fact that the appellate jurisdiction of this court over judgments and decrees of the legislative courts has been upheld and freely exercised under acts of Congress from a very early period, a practice which can be sustained, as already suggested, only upon the theory that the legislative courts possess and exercise judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution." (Emphasis in the original.)

This concept of two kinds of "judicial power," which appear to be identical in all respects except for the Article of the Constitution under which the Congress is deemed to have acted in conferring such power, is, of course, inconsistent with our analysis of the Constitution and with the limited scope of the legislative-court concept which we advocate in Part I of this Argument. If the Congress under Article I can confer "judicial power" upon non-Article III courts permanent in nature and situated within the boundaries of the United States proper, then the purpose of Article III to protect the independence of the judiciary in the exercise of the "judicial Power of the United States" can readily be frustrated and the principal justification for our espousal of the test stated in *O'Donoghue* would be subverted. See pp. 38-41, *supra*.

In this Part of our Argument, however, we are assuming, *arguendo*, that *Williams* was correctly decided, and this assumption requires an adjustment in our frame of reference. While it is perhaps unnecessary to accept everything that was said in *Williams* in order to reaffirm the holding that the Court of Claims was created under Article I, we do not see how acceptance of the concept of two kinds of judicial power can be escaped. As *Williams* conceded in

the above quotation, that concept is essential to any reasonable contention that the holding in *Williams* is consistent with the Tucker Act jurisdiction of the federal district courts and with review by this Court of the judgments of the Court of Claims. We do not believe that there is any serious possibility that this Court, any more than the Court in *Williams,* is prepared to hold invalid the established practice of many years standing with respect to those two matters.

Accepting for present purposes, therefore, the concept of two kinds of judicial power which was an essential premise of the *Williams* decision, it must be conceded that: (1) The basic jurisdiction of the Court of Claims requires the exercise of judicial power; (2) this judicial power, even though conferred under Article I, can be exercised by both Article I and Article III courts; and (3) this judicial power, therefore, can be exercised by the Court of Claims either as an Article I court or as an Article III court. Based upon these premises, we submit that the issue of whether the Court of Claims is to exercise this judicial power as an Article I court or as an Article III court is for the Congress to determine.

If the judicial power exercised by the Court of Claims may be conferred upon either a legislative court or a constitutional court, what objection can there be to effectuating an express declaration by the Congress concerning the nature of the court upon which it chooses to confer the judicial power? Article III authorizes the Congress to "ordain and establish" inferior courts. How can it be held that the Congress has not ordained and established an inferior court under Article III in the face of an express statutory declaration by the Congress that it has done just that? If the Congress should establish a new court in a statute expressly stating that the Congress

acted pursuant to Article III, and the jurisdiction of the Court of Claims was transferred to this new court, could anyone reasonably contend that the court thus established was not a constitutional court created under Article III!

To be sure, this hypothetical new court would be rather an oddity as it would not exercise any Article III judicial power even though created under Article III, if *Williams* correctly held that none of the jurisdiction of the Court of Claims comes within Article III judicial power. Our reasons for believing that *Williams* erred in this holding have been stated. Chief Justice Vinson, in the *Tidewater* case, contended that the ultimate holding in *Williams* categorizing the Court of Claims as a legislative court could and should be explained on other grounds, and that the views expressed in *Williams* concerning the non-article III nature of the jurisdiction of the Court of Claims could and should be disregarded even if the ultimate holding is accepted. 337 U.S., at pp. 640-642, fns. 20, 21. But, in any event, the oddity of an Article III court exercising only Article I judicial power is inherent in the concept, relied upon in *Williams*, of two kinds of "judicial power" both of which may be exercised by an Article III court, and does not involve any insuperable theoretical difficulties if that concept is accepted.[28]

Assuming that the Congress could create a new Article III court and confer upon that court the jurisdiction now exercised by the Court of Claims, surely the Congress

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[28] The settled rule is that Article III does not itself confer jurisdiction upon an inferior court created by the Congress under that Article, and that the Congress may regulate the Article III jurisdiction of an inferior Article III court in such manner as it deems fit. See, *e.g.*, *Lockerty* v. *Phillips*, 319 U.S. 182, 187 (1943); *Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 233-234 (1922). Thus, there does not appear to be anything in Article III requiring the Congress to confer some Article III jurisdiction upon an inferior court created under Article III.

could also change the constitutional basis for the Court of Claims by an express declaration that henceforth the Court of Claims is to be an inferior court existing under Article III. The Constitution can hardly be thought to compel the Congress to go through the purely mechanical process of first abolishing the Court of Claims and then reconstituting it under the same or another name in order to achieve its future existence as an Article III rather than an Article I court.

It is true, as the committee reports demonstrate, that the Congress in the 1953 Act intended to express its determination that the Court of Claims had initially been created under Article III. See pp. 13-14, *supra*. But even if that determination was mistaken and ineffectual insofar as the past status of the Court of Claims is concerned, the declaration of Congress in the 1953 Act is entitled to prospective effect. Thus, in *Postmaster-General* v. *Early*, 12 Wheat. 136, 148-149 (1827), this Court, in an opinion by Chief Justice Marshall, held that:

> "It is true, that the language of the section indicates the opinion, that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law, does not make law. But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act in future. This law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction."

See, also, *United States* v. *Clafin*, 97 U.S. 546, 548-549 (1878).

The principle of the *Early* case plainly is applicable here, assuming that the Congress was mistaken in the view that the Court of Claims initially was created under Article III. The 1953 statute declared that view in language capable of being given future effect, even though inoperative on the past, by declaring the Court of Claims "to be a court established under article III of the Constitution of the United States." There is nothing in the Constitution of which we are aware to prevent the judges of the Court of Claims from continuing to serve without reappointment. They already had life tenure during good behavior, as required by Article III, and were originally appointed by the President and confirmed by the Senate, as required by section 2 of Article II. It is well established that the "Congress may increase the powers and duties of an existing office without thereby rendering it necessary that the incumbent be again nominated and appointed." *Shoemaker* v. *United States,* 147 U.S. 282, 301 (1893). If so, it should also be possible to change the constitutional basis for an office without making it necessary to reappoint the incumbent, particularly where, as here, no material change in functions or duties is involved.

Even if the Court of Claims was a legislative court prior to the 1953 Act, this meant only that it was authorized under Article I and not that it had no constitutional basis at all. Moreover, as we have shown, the judges of the Court of Claims prior to 1953 exercised judicial power identical with that exercised by federal district judges in Tucker Act cases. The only significant aspect of the assumed change of status from a legislative to a constitutional court is that the Congress no longer can diminish the compensation of the judges of the Court of Claims during their continuance in office. The surrender of this right hardly suffices, however, to require that incumbent judges again be nominated

and confirmed. Certainly, neither the President nor the Congress has thought so.

The petitioner in *Lurk* v. *United States,* No. 481, has expressed concern about the power of the Court of Claims to continue rendering reports to the Congress in congressional reference cases, if held to be a constitutional court. This does not seem to us to be a serious problem. If the Congress pursuant to its plenary power over the District of Columbia can require Article III courts in the District of Columbia to undertake legislative or advisory functions, as the *O'Donoghue* case held, surely the Congress may require the Court of Claims to render reports in congressional reference cases pursuant to the plenary power of the Congress over payment of the debts of the United States even though the Court of Claims be an Article III court. See *Pope* v. *United States,* 323 U.S. 1, 13-14 (1944).[29] Professor Moore has so concluded. See 1 Moore, Federal Practice, pp. 72-73 (2d ed.).

In any event, there is no apparent reason why the judges of the Court of Claims may not voluntarily render reports to the Congress in congressional reference cases, even if the Court of Claims as such cannot be required to do so. See *United States* v. *Ferreira,* 13 How. 40, 49-51 (1851); *Hayburn's Case,* 2 Dall. 409 (1792). Indeed, this view of its function in reference cases was adopted by the Court of Claims many years ago. In *Sanborn* v. *United States,* 27 C. Cls. 485, 490 (1892), it was stated that:

> "I am also aware that the Supreme Court held, in an early decision, reported in a note to *Ferreira's* case

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[29] *Harrison* v. *Moncravie,* 264 Fed. 776, 781-782 (C. A. 8, 1920), appeal dismissed, 255 U.S. 562 (1921), held that the rule against exercising jurisdiction over matters in which a final judgment could not be entered applied only with respect to the jurisdiction of the Supreme Court, and that all Article III inferior courts could take jurisdiction of such matters. See, also, *Wallace* v. *Adams,* 204 U.S. 415, 423 (1907).

(13 Howard 52) that a technically judicial court can not be authorized to perform extra judicial services; but I can see no reason why the judges, acting collectively in the name of the court, may not voluntarily perform such services when designated to do so by act of congress, as well as judges of the Supreme Court designated by their official position to sit in other extra judicial tribunals. (Act January 29, 1877, ch. 37, sec. 2; 19 Stat. L., 228)."

The statute thus cited provided for the services of five Justices of the Supreme Court on the Commission established to determine disputed electoral votes in the Hayes-Tilden election. More recent examples that come to mind include the voluntary services of individual Justices in connection with the Pearl Harbor investigation and the Nuremberg War Crimes Trials. In addition, many Article III judges perform services in connection with the Judicial Conference, and this Court collectively acts in what appears to be a quasi-legislative capacity in promulgating the Admiralty, Civil and Criminal Rules pursuant to statutory authorization (28 U.S.C. §§ 2072, 2073; 18 U.S.C. §§ 3771, 3772).

The validity of the congressional reference jurisdiction of the Court of Claims is not in issue in this case, and, for the reasons stated, we do not anticipate any serious problem in defending that jurisdiction if the issue should arise. In any event, the possible doubts about this matter were brought to the attention of the House Judiciary Committee by Judge Madden in testifying with respect to the bill that became the 1953 Act,[30] and Senator Gore also discussed this problem during the Senate debates on that bill. 99 Cong. Rec. 8943-8944. Hence, the Congress by enacting

[30] The hearings held by that Committee have not been printed.

the 1953 legislation must have elected to remove any question as to the status of the Court of Claims as a constitutional court regardless of whether the jurisdiction of the Court over congressional reference cases might be affected.

We submit, therefore, that the declaration by the Congress in the 1953 Act that the Court of Claims is a constitutional court created under Article III should be given effect for the period since the enactment of that statute, even if the Court of Claims previously was a legislative court.

Conclusion

Petitioner does not contend that the assignment of Judge Madden to serve on the Court of Appeals for the Second Circuit was invalid for any reason other than its contention that he was a Judge of a legislative court—the Court of Claims. For the reasons stated above, we believe that the Court of Claims was created as a constitutional court and that the contrary decision in *Williams* should be overruled as wrongly decided. In any event, the 1953 Act validly establishes the status of the Court of Claims as a constitutional court since 1953. The decision below, therefore, should be affirmed.

Respectfully submitted,

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(570-2)

No. 242

In the Supreme Court of the United States

OCTOBER TERM, 1961

THE GLIDDEN COMPANY, INC., PETITIONER

v.

OLGA ZDANOK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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